SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

NO. 73-5468

WILLIAM BUTLER DAWKINS COOPER,
Petitioner

vs.

TEXAS BOARD OF MEDICAL EXAMINERS,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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JURISDICTION

The Petition for a Writ of Certiorari was docketed on September 17, 1973.

STATEMENT OF THE NATURE AND RESULT OF THE CASE

Generally, Respondent concurs with the factual presentation of Petitioner; however, we must note our exception and awe that Petitioner uses this section to assault the supposed transmogrification of Article 4506, V.A.T.C.S., as it affects him, and his speculative arguments as to what might have been. For these reasons, and for the clarification of this Honorable Court, Respondent presents only the salient facts in the instant case.

Petitioner filed this suit to set aside an order of the Respondent revoking and cancelling his license to practice medicine. The Trial Court found that the Order was supported by substantial evidence and affirmed Respondent's action. The Court of Civil Appeals for the Eighth Supreme Judicial District of Texas at El Paso affirmed, denied Motion for Rehearing. Moreover, Petitioner sought a Writ of Error in the Supreme Court of Texas which was denied as was Petitioner's subsequent Motion for Rehearing.

The record reveals that Petitioner was convicted in the District Court of Midland County of the felony offense of driving while intoxicated on January 6, 1967. He was assessed a 5-year probated sentence. Effective June 16, 1967, Article 4506, V.A.T.C.S. was amended changing the procedural appellate review from "trial de novo" to the "substantial evidence de novo" review appeal. On July 26, 1968, Petitioner's probation was revoked in the District Court of Midland County for an attempted abortion. Petitioner appealed such revocation of probation, and the Texas Court of Criminal Appeals affirmed the decision of the District Court on October 22, 1969, rehearing denied December 3, 1969.

On September 10, 1968, the complaint involved in this suit was filed with Respondent for the revocation of Petitioner's medical license. A hearing was held by the Respondent Board on December 4, 1968, and an Order was entered revoking and cancelling Petitioner's medical license. The Respondent Board Order revoking Petitioner's medical license was based on violations of subdivisions (2) and (4) of Article 4505, V.A.T.C.S., being, conviction of a crime of a grade of felony and grossly unprofessional or dishonorable conduct likely to deceive or defraud the public.

QUESTIONS PRESENTED

We would respectfully rephrase the questions presented for review by Petitioner as follows:

1. Is this Honorable Court's decision in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.ED.2d 147 (1973), holding the Texas Abortion Statute unconstitutional, to be applied retrospectively?

2. Was the Court of Civil Appeals proper in its application of the "substantial evidence de novo" rule, or should it have applied the "trial de novo" rule?

3. Does the "substantial evidence de novo" rule violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

REASONS FOR DENYING THE WRIT

1. The Court of Civil Appeals did not err in holding that the decision in *Roe v. Wade, supra*, singularly should be applied prospectively.

2. The Court of Civil Appeals did not err in holding that the "substantial evidence de novo" rule was the proper procedural rule to follow.

3. The Court of Civil Appeals did not err in holding that the "substantial evidence de novo" rule does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

ARGUMENT AND AUTHORITIES

We shall argue Petitioner's Questions 1 and 4 separately. Believing that Petitioner's Questions 2 and 3 are germane, we shall present an integrated argument.

I.
IS THIS HONORABLE COURT'S DECISION IN ROE V. WADE, 410 U.S. 113, 93 S.CT. 705, 35 L.ED.2D 147 (1973), HOLDING THE TEXAS ABORTION STATUTE UNCONSTITUTIONAL, TO BE APPLIED RETROSPECTIVELY?

The United States Supreme Court has accepted the principle that today in criminal and civil law litigations concerning constitutional claims the Court may, in the interest of justice, make the rule prospective where the exingencies of the situation require such an application. *Linkletter v. Walker*, 381 U. S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Tehan v. United States Ex Rel Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). In effect, the Court has held "That there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity

or complete prospectivity for decisions construing the broad language of the Bill of Rights". *Williams v. United States*, 401 U.S. 646, 651, 91 S.Ct. 1148, 1151, 28 L.Ed. 388 (1971).

Careful reading reveals the ruling in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), is purely prospective and therefore does not apply to the parties before this Court. See *Linkletter v. Walker*, supra.

Roe v. Wade, supra, is the now famous Texas abortion case recently decided by the United States Supreme Court. It held, inter alia, the following:

> "A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy state and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment."
>
> "(a) For the stage prior to *approximately* the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."
>
> "(b) For the stage subsequent to *approximately* the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."
>
> "(c) For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in

appropriate medical judgment, for the preservation of the life or health of the mother." (Emphasis added)

The revocation of Dr. Cooper's probation became "final" long before the Supreme Court decision in *Roe v. Wade* was handed down on January 23, 1973. *Linkletter, supra*, which established the Court's power to declare the prospective operation of a new rule, was followed in *Tehan v. Shott, supra*. This case denied retroactive operation of the Fifth Amendment right to be protected against adverse trial comment on a Defendant's failure to testify. The Supreme Court held that *Griffin v. California*, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965) was applied only to cases not "final" prior to April 28, 1965, the date of the *Griffin* decision.

As in *Linkletter*, the Court in *Tehan* found the exingencies of the situation required a limited application, and again attempted to distinguish the right being protected as part of the integrity of the Judicial System, rather than part of the integrity of the fact-finding process. In arriving at the prospective implementation of *Griffin v. California*, the Supreme Court utilized the same three factors it set forth in *Linkletter* for determining whether a new rule of law should be applied retroactively, i.e., (1) purpose of the new rule, (2) relieance on the old rule by the parties, and (3) the effect on the administration of justice if the new rule were applied retrospectively.

Accordingly, if *Roe v. Wade* is to be applied retrospectively to all Texas physicians heretofore convicted of abortion in the State of Texas, we must ask ourselves what effect on the administration of justice this would have, and what purpose would be thereby served. The Supreme Court in *Griffin v. Illinois*, 351 U.S. 12, 100

L.Ed. 891, 76 S.Ct. 585 (1956), concluded that *Griffin's* purpose did not require retrospective effect. Respondent submits that Dr. Cooper's purpose in the instant case does not require retrospective effect and, ipso facto, the Supreme Court in *Roe v. Wade* does not state that the holding therein is to be given retrospective effect.

For example, the *Escobedo*[1] and *Miranda*[2] decisions are not be be applied retrospectively, *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision. *Miranda* applies only to cases in which the trial began after June 13, 1966, the date of that decision. The enabling decision concerning the prospectivity of these two cases is *Johnson v. New Jersey*.[3] The Texas Court of Criminal Appeals has followed *Johnson v. New Jersey*, among others, the cases of *Nixon v. State*, 406 S.W.2d 445 (1966); *Brown v. State*, 406 S.W.2d 916 (1966); *Wilson v. State*, 407 S.W.2d 508 (1966); *Burleson v. State*, 409 S.W.2d 855 (1966); *Pearson v. State*, 414 S.W.2d 675 (1967); *Chambler v. State*, 416 S.W.2d 826 (1967); *Ex Parte Engle*, 418 S.W.2d 671 (1967); and *Taylor v. State*, 420 S.W.2d 601 (1967).

In *Linkletter* and *Tehan*, the line between retrospective and prospective application of a new rule of law is by a conviction finalized, whereas in *Johnson* the line is moved forward in time to the date the trial began. The distinction may be based on practical reasons. Retrospective *Escobedo* and *Miranda* decisions would "impose an unjustifiable burden on the administration of justice."

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[1] 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964)

[2] 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966)

[3] 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966)

In *Flores v. Beto*, 374 F.2d 225 (5th Cir. 1967) certiorari denied, 18 L.Ed.2d 1338 (1967), where the Petitioner by habeas corpus proceedings collaterally attacked his 1960 final judgment, complaining of a search warrant practically identical to the one condemned in *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964), the Fifth Circuit, citing *Davis v. Beto*, 368 F.2d 999 (5th Cir. 1966), cert.den., 386 U.S. 1040, 18 L.Ed. 608 (1967) as holding that *Aguilar* is not retrospective, held that appellant's conviction having become *final* as early as March 28, 1960, long before the rendition of the decisions in *Mapp v. Ohio.*[4] and *Aguilar*, no grounds were presented to the Court upon which habeas corpus release could be granted. Therefore, from what appears to be the holding in *Flores* the Fifth Circuit will apply *Aguilar v. Texas* only to cases not final prior to June 15, 1964, the date of the decision in *Aguilar.*

Linkletter v. Walker, supra, was the first of the so-called prospective Supreme Court Decisions pertaining to criminal matters. The holding of the Supreme Court in *Linkletter* was essentially this: that *Mapp v. Ohio, supra,* excluding in state criminal trials evidence obtained in violation of the Fourth Amendment, would only apply to cases not "final". By "final" the Supreme Court meant "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for Petition for Certiorari had elapsed". The Supreme Court in *Linkletter* decided "that though the error complained of might be fundamental, it is not of the nature requiring us to overturn all final convictions based upon it".

In the case at bar, Dr. Cooper appealed from the revocation of his 5-year probated sentence, the grounds for

[4]367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961)

revocation being his performance of an abortion on a pregnant girl. A large portion of pertinent testimony is quoted at 447 S.W.2d 179 and is thus not repeated here. The Texas Court of Criminal Appeals affirmed that revocation in the aforementioned citation and motion for rehearing was denied on December 3, 1969. Dr. Cooper's conviction thereby became final. Thus, Respondent submits that no fundamental error exists in this case.

As stated, nowhere in *Roe v. Wade, supra*, does the Court indicate that the decision therein rendered declaring Texas abortion laws unconstitutional should be applied retrospectively.

The Supreme Court in *Linkletter*, accepted the rule that today in appropriate cases, the Court may in the interest of justice make a rule prospective; that there is no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exingencies of the situation require such an application. In short, the Court felt that the Constitution neither prohibited nor required retrospective effect.

The Court further found that the states had relied upon *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), overruled by *Mapp v. Ohio, supra*, and that to give *Mapp* retrospective application "would seriously disrupt the administration of justice".

The Court further stated that "[T]o make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be

dimmed. To thus liegitimate such an extraordinary procedural weapon would seriously disrupt the administration of justice."

Accordingly, for this Court to hold that in Dr. Cooper's case the fact that Texas' abortion laws have been partially declared unconstitutional in *Roe v. Wade, supra*, wiping Dr. Cooper's slate clean and making him innocent, would in effect be saying that anyone who had violated our abortion laws for any reason and under any circumstance is now vindicated and free of guilt. The absurdity of such an argument is apparent on its face for each abortion is different, each patient is different, and the stage of pregnancy of the woman in each case is different. And, as will be shown later in this brief, the gregnant girl involved below, as at *approximately* the beginning of her second trimester of pregnancy, a stage wherein a State *may* constitutionally regulate abortions in ways reasonably related to maternal health under *Roe v. Wade*, supra.

II.
WAS THE COURT OF CIVIL APPEALS PROPER IN ITS APPLICATION OF THE "SUBSTANTIAL EVIDENCE DE NOVO" RULE, OR SHOULD IT HAVE APPLIED THE "TRIAL DE NOVO" RULE?

Under Petitioner's Second and Third Questions, he complains of the Trial Court's error in applying the substantial evidence rule of procedure when Petitioner requested a trial de novo and a jury trial. Prior to the 1967 amendment of Article 4506, V.A.T.C.S., the Act provided for a trial de novo on appeal.

The basis of Petitioner's complaint in his application is that the trial court's proceeding under the substantial

evidence rule provided in the 1967 amendment, gives retroactive effect to the amendment since the conviction for felony DWI of the Petitioner occurred prior to the amendment and thus denied him of a trial de novo. Petitioner contends that such is invalid under Art. 1, Section 16 of the Texas Constitution and Art. 1, Section 10 of the United States Constitution.

As noted by the Court of Civil Appeals, the amendment provides for appeal as it did prior thereto. The change in the appellate procedure was from a de novo appeal to a substantial evidence rule appeal. This is a change in the *procedural* law of appeal rather than a change in the *substantive* law. *Lawyers Lloyds of Texas v. Webb*, 152 S.W.2d 1096 (Tex.Sup. 1941).

The objection as to retroactivity of the law applies to *substantive law* and not to the procedural aspects. *Bryant v. State*, 457 S.W.2d 72 (Writ ref., n.r.e.); *Holt v. Wheatler*, 301 S.W.2d 678 (writ dism.); *Falls v. Key*, 278 S.W. 393 (writ dism.)

Petitioner obtained no vested right of appeal until his appeal was perfected that being December 23, 1968, long after the substantial evidence rule amendment had been effected. *State Board of Medical Examiners v. Mann*, 413 S.W.2d 382 (Tex. Sup. 1967); *Texas State Board of Medical Examiners v. Haney*, 472 S.W.2d 550 (Writ ref. n.r.e.).

It is anomalous that Petitioner is asking this Court to apply *Roe v. Wade*, supra, retrospectively for the benefit of Dr. Cooper while asking this Court to refuse to apply the substantial evidence rule amendment to the Medical Practice Act. (Art. 4505, et seq) retrospectively.

Petitioner also complains that the action of the Medical Board was not supported by substantial evidence in existence at the timeof the Board's hearing on December 4, 1968.

Looking at the record, what facts were in existence at such time? Chronologically, they were:

FACT: Petitioner had been convicted of misdemeanor DWI.

FACT: Petitioner was convicted in the District Dourt of Midland County of the felony offense of Driving While Intoxicated on January 6, 1967. He was assessed a 5-year probated sentence.

FACT: Petitioner performed an abortion on an unmarried 21-year old girl.

FACT: On July 26, 1968, Petitioner's 5-year probation was revoked by the District Court of Midland County, Texas.

FACT: On September 10, 1968, a complaint was filed against Petitioner seeking to revoke and cancel his license to practice medicine for violation of Article 4505 (2) and (4).

FACT: On December 4, 1968, a hearing was held and The Texas State Board of Medical Examiners revoked Petitioner's license to practice medicine in Texas.

It is eminently clear from the foregoing that Respondents action in revoking Petitioner's medical license had reasonable support in substantial evidence. Administrative review in Texas has consistently been concerned with whether or not at the time the order was entered there existed sufficient facts to justify the action, rather than what the administrative agency actually heard. *Railroad*

Commission v. Shell Oil Co., 161 S.W.2d 1022, (Tex.Sup. 1942).

Petitioner would have this Court accept the proposition that Dr. Cooper has a *vested* right to practice medicine in the State of Texas, and that a person of such weak moral fiber possesses those qualities expected by a citizen when he seeks the professional services of a skilled physician for treatment of his ills and infirmities. The twelve physicians constituting the Texas State Board of Medical Examiners, all peers of Petitioner, think not. Also, the District Court and the Court of Civil Appeals of Texas did not substitute their judgment for those twelve physicians, who, after all, are in better position than anyone to judge their own. Although they are not learned in the law, they possess the wisdom and insight to know those special qualifications (including mental, physical and moral) that the practice of medicine demands of its ranks.

Each of us knows what a trying life a physician must lead if he is conscientious to his patients and adheres to the tenets of the Hippocratic Oath. If a physician cannot practice within the canons and ethics of his profession, then, in the opinion of the Board of Medical Examiners, the people of this state are entitled to be afforded protection from such a dangerous wrongdoer as this.

Art. 4505 (4), V.A.T.C.S. empowers the Board of Medical Examiners to revoke the license of a physician for unprofessional or dishonorable conduct which is likely to deceive or defraud the public. The statute provides that unprofessional or dishonorable conduct shall include, but *shall not be limited* to, the commission of any act which is a violation of the Penal Code of Texas when such act is connected with the physician's practice of medicine. It

further provides that a *conviction* of a Penal Code violation shall not be necessary for the enforcement of the provision.

Both the Respondent Board and the trial court, on appeal, had before them the fact that Petitioner had been charged, plead quilty, and found guilty of a felony driving while intoxicated charge, from which he did not appeal, and the further evidence that Petitioner had committed an abortion, which evidence was produced at Petitioner's hearing on his revocation of probation.

Petitioner attempts to convince this Court that the conviction of the felony drunk driving charge is not a violation, or sufficient grounds for revocation of medical license, under Subdivision 4 of Article 4505.

It is difficult for Respondent to believe that the excessive use of alcohol by a physician leading to a guilty plea to a felony driving while intoxicated charge is not of vital importance to the public. Also, it is incomprehensible that his plea to the charge is not sufficient evidence of unprofessional and/or dishonorable conduct in violation of Subdivision 4 of Article 4505.

61 Am.Jur.2d 180, Physicians, Surgeons, etc., Section 57, states:

> **"The conviction of a criminal offense, particularly one involving moral turpitude, is usually regarded as sufficient ground for the revocation of a physician's or dentist's license, and the offense need not be one related to the profession itself."**

It had been held that the conviction of a dentist of the

crime of rape was dishonorable conduct. *South Carolina State Dental Examiners v. Breedlad*, 208 S.C. 469, 38 L.Ed.2d 644, 167 A.L.R. 221.

A felony income tax evasion was held to involve moral turpitude in *Morris v. Board of Medical Examiners*, 230 Cal.App.2d 704, 41 Cal.Reptr. 351, 12 A.L.R.2d 1201.

Further, in *Goldman v. State*, 277 S.W.2d 217 (Tex. Crim.App. 1954, writ ref. n.r.e.), an osteopath's plea of nolo contendre to a violation of the Harrison Anti-Narcotic Act was found to be dishonorable conduct.

Perhaps the most recent case is that of *J. J. Martinez, M.D. v. Texas State Board of Medical Examiners*, 476 S.W.2d 400, (Tex.Civ.App. 1972, writ ref. n.r.e.) where the court held that even an *attempted* abortion would support a charge of dishonorable conduct under Subdivision (4) of Article 4505. In *Martinez*, no criminal charges were even filed against the Defendant.

Petitioner relies heavily on the Texas Supreme Court decision in the case of *Korndorffer v. Texas Board of Medical Examiners*, 460 S.W.2d 879 (Tex. 1970), which stated that the doctor's failure to keep proper records of his drug purchases and sales are not likely to deceive the public. Respondent submits, however, that the presentation and mode of trying the *Korndorffer* case was completely different from the case herein and that the above holding by the Court is not pertinent to the subject case. There is a great difference in that the *Korndorffer* case was tried primarily on violation of federal requirements as to recordkeeping of a doctor's drug purchases and sales.

The patient may never know or care whether his doctor is a good bookkeeper, however, he would legitimately be fearful of his life when treated in an emergency situation by a doctor whose judgment and steady hand is affected by alcohol. This is why the public is entitled to the protection from such physicians as Dr. Cooper.

As noted, the statute does not limit Respondent Board from considering *any* conduct which, in its opinion, is unprofessional or dishonorable. Thus, the burden is not on Respondent to show that Felony DWI is unprofessional or dishonorable conduct; but, is upon Petitioner to show that it is not.

III

DOES THE "SUBSTANTIAL EVIDENCE DE NOVO" RULE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

Petitioner urges that he has been denied certain constitutional rights and that the action below was in violation of the due process and equal protection clauses of the Texas and United States Constitutions.

As stated by the Court of Civil Appeals below, this attack was answered by the *Martinez* decision, *supra*. Therein, the Court held that the Legislature of this State was expressly granted the constitutional authority to regulate the practice of medicine by Art. 16, Section 3, of the Texas Constitution which provides:

> "The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for malpractice, but no

preference shall ever be given by law to any school of medicine."

No one has proposed that, as stated by Petitioner, the members of the Texas Board of Medical Examiners are learned in the law, however, they have no peers in their understanding of the duty they owe the members of the public who subject themselves to the treatment of a physician expecting nothing but the highest quality of judgment, sill, ability and concern for such patient. Because of the evidence, the Medical Board did not feel that Dr. Cooper provided these guarantees to his patients and revoked his license to practice medicine.

The *Martinez* case also discusses whether the doctor is provided due process by the provisions of the Texas Medical Practice Act, it determined that due process was provided, and in that regard stated:

> "Appellant urges that, in any event, a review under the substantial evidence rule deprives him of due process in violation of the United States Constitution. The basic element of due process are notice, hearing, and an impartial trier of facts. See City of Houston v. Fore, 412 S.W.2d 35 (Tex. 1967). Due process does not require that the hearing conform to judicial process. F.C.C. v. W.J.R. the Good Will Station, 337 U.S. 265, 69 S.Ct. 1097, 93 L.Ed. 1353 (1949); Rutz v. Michigan, 188 U.S. 505, 23 S.Ct. 390, 47 L.Ed. 563 (1903). Trial by jury is not required in cases of this nature. City of Houston v. Blackbird, supra. The ultimate test of due process of law in an administrative hearing is the presence or absence of rudiments of fair play long known to our law. Reavley, Substantial Evidence and Insubstantial Review in Texas, 23 S.W. L.J. 239 (1969). The notice, hearing

and review provided for in Article 4506 did not deprive appellant of due process in violation of the United States Constitution.

"Appellant specifically complains of the Texas type of substantial evidence review whereby the Board's order is reviewed based on the evidence which is presented before the trial court. This procedure, which has been described as "substantial evidence de novo review," has been subject to mach criticism but, nevertheless, has been consistently upheld by our courts. Southern Canal Co. v. State Board of Water Engineers, 159 Tex. 227, 318 S.W.2d 619 (1958); Jones v. Marsh, 148 Tex. 362, 224 S.W.2d 198 (1949); Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424 (1946); Cook Drilling Co. v. Guld Oil Corp., 139 Tex. 80, 161 S.W.2d 1035 (1942); Garcia v. City of San Antonio, 427 S.W.2d 947 (Tex.Civ.App.–San Antonio 1968, writ ref'd n.r.e.). Any change in this procedure must come from the Legislature on the Supreme Court. Appellant's points attacking the constitutionality of the procedure prescribed by Article 4506 are without merit and overruled."

Should this Court accept the proposition of Dr. Cooper that the holding in *Roe V. Wade* vindicates and absolves him from any wrongdoing, then every abortionist in the State of Texas since time immemorial would not be considered lily-white and free of guilt. The fact remains that at the time Dr. Cooper performed the abortion on the young girl, such act was criminal under our statutes and such act constituted reasonable grounds for the Board of Medical Examiners to revoke Dr. Cooper's license to practice medicine in this state, for such action on his part is clearly tantamount to grossly unprofessional conduct of a nature likely to deceive and defraud the public. *Martinez*

v. Texas State Board of Medical Examiners, supra.

Dr. Cooper wails loud and long that the young girl upon whom he performed an abortion was "only" 12 weeks and 4 days pregnant; thus says he, clearly falling within the purview of the co-called exampt period of pregnancy as declared by the United States Supreme Court in *Roe v. Wade, supra,* namely the first trimester.

Respondent would respectfully show unto this Court that the normal term of pregnancy is 266 days and that a person 12 weeks and 4 days pregnant is 88 days into her pregnancy. Reduced to fractions, the young girl was about one-third through her term, or, less than 24 hours of being into the second trimester. We urge this Honorable Court to carefully note the language of the United States Supreme Court in *Roe v. Wade*, at page 732 of its Opinion (93 S.Ct. 705) wherein it was held that "[f]or the stage prior to *approximately* the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. For the stage subsequent to *approximately* the end of the first trimester, the State in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."

Accordingly, it can readily be seen that the pregnant girl was in her last day of the first trimester at the time of her abortion and was therefore in a "state subsequent to approximately the end of the first trimester" wherein the *Roe v. Wade* decision clearly emphasizes that a State may regulate abortion procedures during this period in ways that are reasonably related to maternal health. The record below is void of any testimony or other evidence that the

maternal health of the pregnant girl was involved in any decision-making process by Dr. Cooper to perform an abortion on her.

Respondent submits that the revocation of Dr. Cooper's 5-year probated sentence was based upon valid law; that he was exhausted his remedies of appeal; that *Roe v. Wade*, operating prospectively only; and that it should have no influence on the decision of the Court here.

Dr. Cooper clearly was afforded every constitutional right of protection. He was personally present at each hearing. He was represented by counsel at each hearing. He was given fair and adequate notice of each hearing. The same rules of law and evidence were applied to Dr. Cooper as are applied to any other physician in like circumstances.

CONCLUSION

On the points raised by Petitioner and on the record as a whole, the Court of Civil Appeals for the Eight Supreme Judicial District of Texas is in all things correct and the Petition for Writ of Certiorari should be refused.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bill Campbell, Assistant Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of the foregoing brief have been served upon the attorneys for Petitioner, Benson & Benson, 512 Citizens Tower, Lubbock, Texas, 79401, by depositing said copy in the United States Mail with sufficient postage affixed thereto this 18 day of October, 1973.

Bill Campbell

BILL CAMPBELL